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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ANIL C. SINGH PART 14

Justice

Index Number : 110829/2010

1234 BROADWAY, LLC

VS.

DIV. OF HSG COMMUNITY RENEWAL

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that ~~this motion~~

the petition is decided in accordance with the annexed decision and order.

FILED

APR 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 13, 2011

HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

----------X

In the Matter of the Application of
1234 BROADWAY, LLC,

Petitioner,

For a Judgment Under Article 78 of the
Civil Practice Law and Rules,

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL and
DIANA DJOKAJ,

Respondents.

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DECISION AND
ORDER

Index No.
110829/10

HON. ANIL C. SINGH, J.:

Petitioner 1234 Broadway, LLC, moves pursuant to Article 78 of the CPLR to annul an order issued by respondent New York State Division of Housing and Community and Renewal ("DHCR") on June 16, 2010, denying a petition for administrative review ("PAR") of a rent order issued by a rent administrator. Respondents DHCR and Diana Djokaj oppose the petition.

This proceeding has its genesis in two rent overcharge complaints filed with DHCR on April 24, 2008, by the tenant Diana Djokaj with respect to two SRO units. Djokaj occupied Unit 1008 from November 1, 2004, to March 31, 2005. On April 1, 2005, she moved to Unit 516.

Petitioner through its attorney interposed an answer alleging that there was

no rent overcharge and that a lawful rent was being charged to the tenant based on an additional vacancy allowances, longevity allowances, individual apartment improvements and rent guideline increases. Petitioner maintained before DHCR that Unit 1008 was renovated prior to the tenant taking possession at a cost of $14,045.00. The proper rent for Unit 1008 after taking into account the various allowances was $1,065.28

Unit 516 was gut renovated while Djokaj occupied Unit 1008. The renovations included new piping, radiators, Sheetrock, floors, walls, cabinets and appliances. The cost of the revocation of this unit was $30,120.00.

At the request of the tenant, she moved into the Unit 516 on April 1, 2005, after the renovations were completed. The lawful rent for this unit was $1,295.73. The tenant was being charged a preferential rent of $650.00.

Djokaj's response to DCHR was that the so-called "preferential rent" for Unit 516 was higher than the legal rent. She asserted that there was an identity of interest between the owner and the contractor who performed the renovation. Djokaj contended further that, in actuality, the work was being performed by building employees. The tenant claimed that the owner of building – Alfred Sabet, 1234 Broadway LLC, Sabet Management Company and Sabet Development – are interrelated family owned-and-operated businesses. Further, the owner

misrepresented the scope and cost of the renovation of Unit 516, and the work performed was merely normal maintenance and repair.

These issues were litigated before the DHCR. On July 31, 2009, the DHCR issued a final notice of imposition of treble damages for an overcharge. The rent administrator proposed that there had been an overcharge and proposed a penalty of three times the amount of the overcharge. The owner was given an opportunity to show that there was no overcharge and/or that the overcharge was not willful.

The owner and tenant made a series of submissions again on the overcharge issues. A second final notice of treble damages for overcharge was issued by the DHCR on October 3, 2009. Again, the rent administrator proposed that there had been an overcharge and gave the owner an additional opportunity to contest it.

The tenant responded, asserting that the owner and the contractor shared the same address and that a principal of the contractor was an officer of the owner. Further, the tenant claimed that there were discrepancies in the documentation submitted by the owner regarding the improvements.

In Fall 2009, DHCR requested additional information from the owner regarding the payments for the improvements made to the apartments. Petitioner responded by letter from its counsel on November 16, 2009, acknowledging that there was a connection between the owner and the contractor. However, petitioner

maintained that the corporations were separate business entities which served different purposes. The petitioner explained that the discrepancy in the cost of materials was based on factors such as labor costs, overhead and profit. New appliances, fixtures, countertops, flooring and molding were installed in the unit.

Petitioner did not, however, submit proof of payment as requested by DHCR. Thereafter, on November 19, 2009, DHCR again requested this documentation. The owner responded by letter dated November 30, 2009, that all proof of improvements in its possession had been submitted. Further, the owner contended that the evidence submitted far exceeds what is required by DHCR's Policy Statement 90-10.

On December 9, 2009, the rent administrator found a rent overcharge in the sum of $7,759.20 and awarded treble damages in the amount of $12,825.36 with interest for a total award in the sum of $22,039.79. The owner was denied the cost of improvements because it had "failed to provide the agency with adequate proof of payment for the cost of improvements as claimed."

The PAR was denied on June 16, 2010. DHCR acknowledged that under Policy Statement 90-10, increases for improvements to apartments can be established by the following documentation: cancelled checks contemporaneous with the completion of the work; contemporaneous invoices marked paid in full; a

signed contract agreement; or a contractor's affidavit stating that the work was performed and paid in full. However, under the policy statement, additional information may be requested by DHCR where there is an equity interest or an identity of interest between the owner and the contractor.

DHCR found that the owner and the contractor were separate business entities with a family relationship and a possibly overlapping business relationship. There were discrepancies in the documentation regarding the ordering of appliances. The labor costs were not for work performed on the units but, rather, for the salaries of full-time building employees. Based on the documentation submitted by the owner, DHCR found that it was proper for the rent administrator to request proof of actual payment from the owner to the contractor for the work performed on the unit. Because the owner failed to provide this documentation, the rent administrator properly disallowed the increase for apartment improvements and assessed treble damages.

In this Article 78 proceeding, petitioner urges that DHCR's denial of its PAR is arbitrary and capricious. It complied with Policy Statement 90-10 by providing signed contracts for the work; photographs showing that the work was completed; and receipts and invoices and the payroll record to show its labor costs.

Petitioner urges that the fact that the owner and the contractor are related is not a basis to deny an increase for improvements that were documented in accordance with Policy Statement 90-10. Its determination is inconsistent with prior DHCR precedent granting increases although the entities have a common interest. The owner should not be penalized for utilizing his brother's contracting company for making the improvements.

Further, petitioner argues that DHCR implied from one invoice that the owner and the contractor are not separate entities. It ignored proof concerning their separate identities, including filing separate tax returns and maintaining separate employees and payrolls. DHCR disregarded evidence submitted by petitioner establishing the cost of the renovation, the labor costs and the fact that the renovation was completed.

Finally, petitioner maintains that treble damages should not have been assessed because the rent charged to the tenant was predicated on a good faith, rational belief that the owner was entitled to the increase based on the various allowances and the fact that improvements in the sum of $30,120.00 were made to the units.

Discussion

An administrative determination is arbitrary or capricious if made "without

sound basis in reason" and "taken without regard to the facts." (Pell v. Board of Education, 34 NY2d 222, 231 [1974]). Courts may not substitute their judgment if a rational basis supports the determination (Purdy v. Kreisberg, 47 NY2d 354 [1979]). A determination is "arbitrary and capricious" if the court finds that the conclusion drawn from the facts adduced at the hearing or otherwise, or the administrative action taken based on them, is untenable as a matter of law (Siegel, NY Prac section 561, at 967 [4th ed]). While judicial review must be meaningful, it is not the role of the courts to weigh the desirability of any action or to choose among alternatives (6 N.Y. Jur.2d Article 78 sec. 13). "The judicial function is at an end once it has been determined that an agency's conclusion has a sound basis in reason" (6 N.Y. Jur.2d Article 78 sec. 15).

The court's review of an agency determination is limited. "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld." Matter of Ansonia Residents Assn. v. New York State Div. of Hous. & Community Renewal, 75 NY2d 206, 213 (1989).

Here, petitioner concedes that there was an identity of interest between the owner and the contractor based on a family relationship. Under Policy Statement 90-10, DHCR had the right to require additional proof. The statement provides in relevant part that:

> Whenever it is found that a claimed cost warrants further inquiry, the processor may request that the owner provide additional documentation. If it is found that there is an equity interest or an identity of interest between the contractor and the building owner, then additional proof of cost and payment, specifically related to the installation, may be requested. Where proof is not adequately substantiated, the difference between the claimed cost and the substantiated cost will be disallowed.

Accordingly, there was a rational basis for DHCR to find that there was an equity interest and/or an identity of interest and to impose a higher level of scrutiny requiring additional information in the form of actual payment from the owner to the contractor for the work it claims was performed. The requested information is not unreasonable because it would establish that the costs were actually incurred for work performed.

The record is replete with requests by the rent administrator for additional information from the owner. The owner failed to provide the information. Instead, petitioner took the position that it had provided all necessary documentation as required by Policy Statement 90-10. However, the Appellate Division has held that compliance with Policy Statement 90-10 "does not necessarily end DHCR's inquiry, and DHCR may conduct such inquiry as it deems

appropriate to determine compliance with the laws it enforces." (201 East 81 Street Associates v. DHCR, 288 AD2d 89, 90 [1st Dept. 2001]).

The burden is on petitioner to establish that it is entitled to a rent increase based on renovations to the apartments (985 Fifth Avenue v. DHCR, 171 AD2d 572 [1st Dept. 1991]). Here, DHCR did not find credible the labor costs attributed to the renovation. This determination was not irrational in light of the fact that the labor cost was for the salaries of four full-time employees paid by the owner for nine weeks of work in Unit 516 and four weeks in Unit 1008. It was permissible for DHCR as the fact finder to evaluate the data provided by petitioner and determine that the owner had failed to link the cost of the repair to the particular apartment and deny the increase based on petitioner's failure to provide adequate information. In short, based on the relationship of the owner and the contractor and petitioner's failure to provide additional documentation in response to DHCR's request for additional documentation, it cannot be said that its factual findings denying the rent increase are irrational.

Next, turning to the issue of treble damages, Rent Stabilization Code Section 26-516(a) provides that a rent administrator's finding of a rent overcharge creates a presumption that the overcharge is willful. The owner has the burden to establish that the overcharge is not willful (Sterling Apartments v. DHCR, 269

AD2d 266 [1st Dept. 2000]).

Petitioner failed to sustain its burden to show that the overcharge was not willful. It is an undisputed fact that the owner and the contractor were members of the same family with an identity of interest. Therefore, DHCR was required to utilize a higher level of scrutiny requiring additional information relating to the costs for the claimed improvements to the unit. The owner failed to substantiate its costs although given numerous opportunities by the rent administrator. Further, as DHCR found, the owner's salaried employees performed the work on the units. The owner then improperly included the workers' salaries as a basis for the rent increase. This misrepresentation undercuts any claim by the owner that it was acting in good faith.

For these reasons, the petition is dismissed with prejudice.

The foregoing constitutes the decision and order and judgment of the court.

Date: April 13, 2011
New York, New York

Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE